No. 43099-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

AVRILIRENE TAVAI and THOMAS TAVAI,
and their marital community
Appellants,

v.

WAL-MART STORES, INC.,
a Delaware entity doing business in the State of Washington with its corporate headquarters in Bentonville, Arkansas
Respondent.

REPLY BRIEF OF APPELLANTS

Ron Meyers
Ken Gorton
Tim Friedman
Attorneys for Appellants

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA # 13169
WSBA # 37597
WSBA # 37983

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations and Rules

REPLY TO RESPONDENT'S BRIEF

I. INTRODUCTION

Ms. Avrilirene Tavai was severely injured when she slipped and fell in a Wal-Mart store. The trial court's erroneous granting of Wal-Mart's Motion for Summary Judgment deprived Ms. Tavai of a fair trial.

The Tavais reply to the Brief of Respondents, with respect to Wal-Mart's factual and legal allegations, as follows:

II. ARGUMENT

1. Questions of material fact remain.

A. Rebuttal argument that the *Pimentel* exception applies.

Wal-Mart is a self-service store, and Ms. Tavai was in a self-service area when she fell. Nevertheless, in *Ingersoll v. Debartolo*, the Supreme Court stated,

> 'self-service' is not the key to the exception. Rather, the question is whether 'the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.

Ingersoll v. Debartolo, Inc. 123 Wn.2d 649, 654, 869 P.2d 1014 (1994), citing *Pimentel v. Roundup Co.,* 100 Wn.2d 39, 49, 666 P.2d 888 (1983).

The Tavai's met this standard, as well as the tree-part test from *O'Donnell v. Zupan*, for the *Pimentel* exception to apply. They have shown

that (1) the area where Ms. Tavai fell was self-service, (2) Wal-Mart's self-service mode of operation inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous condition that caused the injury was within the foreseeable area. *O'Donnell v. Zupan*, 107 Wn. App. 854, 856, 28 P.3d 799 (2001).

Wal-Mart is a self-service operation and the water that caused Ms. Tavai's injuries was within the self-service area. Ms. Tavai was walking towards the checkout lanes and was fifteen feet from them when she fell, she was in "an area where customers handle and transfer goods from one place to another, presenting an inherent risk of items dropping on the floor and creating a hazard." *Id.* at 859. By Wal-Mart's own admission, the store was busy at the time Ms. Tavai fell. Res. Br. at 5. When viewing the photographs Wal-Mart produced through discovery (CP 88, 240, 241), common sense allows one to infer that when the store is busy, the line of customers waiting to check out would extend to the area in which Ms. Tavai fell. Additionally, "grab-and-go" drinks are located in this same area and accessible to any customer waiting in these lines. CP 88, 240, 241. It is reasonably foreseeable that customers could take and open these drinks, possibly spilling some of the drink onto the floor, while waiting in line to check out.

The nature of the business is an all-purpose store that has multiple

sources of water for sale, and the method of operation is a self-service store and where customers wait in-line to check-out, handle and transfer goods. The nature of the business and the method of operation created foreseability of unsafe conditions on the floor. No proof of prior spills in that exact location is necessary for the *Pimentel* exception to apply.

The facts at hand are easily distinguishable from the cases in which the *Pimentel* exception was found to not apply. Those hazards either did not occur in a self-service area or the hazard was not related to that particular self-service operation. In *Wiltse v. Albertson's Inc.,* the hazard was water that had leaked from the roof. *Wiltse v. Albertson's Inc.,* 116 Wn.2d 452, 805 P.2d 793 (1991). In *Arment v. Kmart,* the hazard was a spilled soft drink in the menswear department. *Arment v. Kmart Corp.,* 79 Wn. App. 694, 902 P.2d 1254 (1995). In *Carlyle v. Safeway,* the hazard was spilled shampoo in the coffee aisle. *Carlyle v. Safeway,* 78 Wn. App. 272, 896 P.2d 750 (1995). In *Ingersoll v. DeBartolo*, the hazard was an unknown spill in the common area of the Tacoma Mall. *Ingersoll v. DeBartolo, Inc.* 123 Wn.2d 649, 869 P.2d 1014 (1994). In *Coleman v. Ernst*, the hazard was a carpet in the entry-way to the store. *Coleman v. Ernst*, 70 Wn. App 213, 853 P.2d 473 (1993). The bare facts of these cases alone show that they do not meet the most basic requirements for the self-service exception to apply, that the hazard be within

a self-service area and directly related to that particular self-service operation. Such hazards are not inherently foreseeable as a result of customers transferring goods from one place to another, unlike the instant case, where Ms. Tavai slipped on a puddle of water, a foreseeable hazard given the location she was in - fifteen feet from the checkout lanes, in a store that sells water and directly in front of grab-and-go drinks.

Once it is established that a dangerous condition was reasonably foreseeable, an issue of fact remains on whether the defendant failed to take reasonable care to prevent the injury. *Pimentel* at 49. The reasonableness of a proprietor's methods of protection is a question of fact. *Ciminski v. Finn Corp.,* 13 Wn. App. 815, 820-821, 537 P.2d 850 (1975). "The type of precautions that are 'reasonable' depend on the 'nature and the circumstances surrounding the business conduct,' including the mode of operation. *O'Donnell* at 860.

Here, Wal-Mart repeatedly reference its safety and inspection practices and guidelines, that employees were trained to stop and clean up spills whenever they saw them, that employees carried clean-up supplies with them at all times, and that employees engaged in specific safety inspections throughout the day to look for spills. Res. Br. at 25. Through this testimony, Wal-Mart offers evidence of their safety and inspection guidelines but has

offered no evidence that these guidelines were followed. Presumably, if Wal-Mart applied its training to practice, they would have been able to provide the last time during the day of the subject incident when water was *not* on the floor. All Wal-Mart offers is testimony that employees were busy and did not see any water on the floor. Res. Br. at 5-6. Whether Wal- Mart employees properly inspected and maintained the area in which Ms. Tavai fell would have appeared on their surveillance video. However, because Wal-Mart destroyed this video, the only evidence of proper maintenance is a negative inference Wal-Mart creates in stating their employees are trained to clean up spills when they see them. Res. Br. at 25. This is an issue of fact for the trier of fact to determine, and summary judgment was inappropriate.

B. Wal-Mart was negligent in its choice of flooring.

The Tavais have obtained an expert in human factors, Dr. Gary Sloan, who has authored a report on this incident with photographs and exhibits. CP 157-214. Dr. Sloan sets forth several opinions that raise genuine issues of material fact, including his opinion that "the floor in the area where Ms. Tavai fell posed a serious slip hazard to pedestrians when wet." CP 165. Dr. Sloan explained that the coefficient of friction, or slip factor of this particular material, equates to that of "ice and compact snow" when the vinyl floor is wet. CP 165. Accordingly, for this reason alone, genuine issues of material

fact exist as to whether Respondent (Wal-Mart) breached its duty to provide a safe, slip-resistant floor to its customers. This is especially true considering the presence of water on a shopping-center floor is reasonably foreseeable, particularly given the large amount of products being sold that can cause leakage and the 51 other occurrences of slip-and-fall injuries reported at this location between 2005 and 2007. *Id.*

The trial court reviewed this testimony, which raises facts disputed by Wal-Mart, but concluded that there are no genuine issues of material fact in this case to support the Tavais' claim of negligence. It made that decision applying both the "reasonably foreseeable" standard and the "actual or constructive notice" standards. Respectfully, by doing so, the trial court has substituted its judgement for that of the jury in derogation of the summary judgment standards and the interests of justice.

When making its analysis, a court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate ***only*** if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). "In a summary judgment motion, the burden is on

the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper." *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Here, the Tavais have distinguished the cases relied upon by Wal-Mart in its Motion for Summary Judgment. Under the "reasonably foreseeable" standard, there is ample testimony to support that Wal-Mart knew its floor was unreasonably slippery when wet, and that it was foreseeable that puddles of water would be present in a grocery store (with 51 other slip and fall occurrences). The Tavais do not need to prove their case through summary judgment, but only must show that there is material testimony for the jury to consider in support of the Tavais' claim. The Tavais have met this burden.

C. Wal-Mart had constructive notice of the dangerous condition.

The Tavais have also provided ample testimony to show that Wal-Mart had actual and constructive notice of the unusually dangerous nature of its vinyl flooring that has a coefficient of friction of ice and snow when wet. CP 157-214. The Tavais have shown that Wal-Mart had actual and constructive notice of multiple other slip and fall incidents in its store on this flooring. Further, Wal-Mart has actually admitted its floor was slippery when

wet. Again, the issue of notice is for the jury to determine though the testimony of the Tavais' expert. **To date, Wal-Mart has not even attempted to introduce expert testimony to rebut the Tavais' expert opinions.** The Court must view Dr. Sloan's testimony in a light most favorable to the Tavais and must as a matter of law permit the finder of fact to make these determinations. The Tavais have met their burden on summary judgment.

2. The Tavais' "new" theory is not new. Wal-Mart never moved for summary judgment to dismiss the Tavais' negligence claim regarding the use of dangerous flooring.

Wal-Mart argues that the Tavais raised a "new" theory of negligence in the middle of Wal-Mart's summary judgment motion. In support of its argument, Wal-Mart cites to *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 122 P.3d 729 (2005), where the plaintiff brought a breach of contract action and then claimed fraud (a tortious claim) in a motion for reconsideration. The court appropriately found such pleading to be inappropriate because claims grounded in contract and tort are entirely different and because the new cause of action was inserted into the motion for reconsideration.

Here, however, the Tavais have maintained negligence against Wal-Mart since the beginning of this lawsuit. During the course of discovery, the

Tavais' expert in human factors, Dr. Gary Sloan, authored a report on this incident with photographs and exhibits. CP 157-214. Among other things, Dr. Sloan found "the floor in the area where Ms. Tavai fell posed a serious slip hazard to pedestrians when wet." *Id.* at 165. Dr. Sloan explained that the coefficient of friction, or slip factor of this particular material, equates to that of "ice and compact snow" when the vinyl floor is wet. *Id.* Dr. Sloan also discussed the 51 other slip and falls. This supports the Tavais' negligence claim with regard to the use of dangerous vinyl flooring, which foreseeably and proximately caused Ms. Tavai's injuries.

The Tavais' position regarding Dr. Sloan's testimony, including the Tavais' claim of negligence as it relates to Wal-Mart's selection of slippery vinyl flooring in a self-service grocery store, was presented in the Tavai's Response Brief (not the Tavais' Motion for Reconsideration) CP 225-232. This was the Tavais' first opportunity to do so, and was the appropriate time to raise this issue in motion practice.

At the hearing, Wal-Mart admitted the floor was slippery when wet, then argued the Tavais' negligence claim should be dismissed because of this admission, that is, Wal-Mart admits the use of dangerous flooring so there are no issues of material fact. RP 11, 57. Again, this is the inverse of the summary judgment standard. Based on Dr. Sloan's testimony and Wal-

Mart's admission, it is a manifest error of law to dismiss the Tavais' negligence claim. Moreover, as stated above, the Tavais' have maintained this claim throughout these proceedings.

Summary judgment dismissal cannot be granted against the Tavais on this issue as a matter of law, because there are material issues of fact regarding Wal-Mart's use of dangerous flooring. "In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper." *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). The trial court erred in dismissing all negligence claims against the Tavais.

3. Rebuttal argument that Appellant should be granted spoliation inference.

Contrary to what Wal-Mart asserts, Washington case law does not limit "spoliation" to circumstances in which evidence has been willfully destroyed. Res. Br. at 33. Rather, bad faith or conscious disregard of the importance of the evidence can be sufficient to warrant a sanction by the court. *Henderson v. Tyrrell*, 80 Wn. App. 592, 609-610, 910 P.2d 522 (1996). This Court has expressly stated:

> By noting that disregard can be sufficient to deserve a sanction, the *Henderson* opinion suggests that spoliation encompasses a broad

> range of acts beyond those that are purely intentional or done in bad faith.

Homeworks Construction, Inc. v. Wells et al., 133 Wn. App. 892, 900, 138 P.3d 654 (2006).

Clearly, the destruction of evidence need not be willful or even done in bad faith. Conscious disregard or a careless loss of evidence should not go without penalty if the evidence is important to the litigation and its non-production creates an unfair advantage to the non-producing party, as in this case.

Here, Ms. Tavai immediately reported the incident and Wal-Mart was put on notice of the potential lawsuit by this report. If the area in which Ms. Tavai fell was not wet for long prior to her fall, it was in Wal-Mart's interest to document that fact. But if the area was wet, and had been for awhile, video of the area in which Ms. Tavai fell would be damaging.

The evidence that would conclusively support or rebut Wal-Mart's claims about conditions in the store and whether Wal-Mart employees properly maintained the area was in their exclusive control. All relevant footage of the area in which Ms. Tavai fell, and everything recorded by the other store cameras was gone before Ms. Tavai had any opportunity to view it. In fact, Wal-Mart argued that it had reviewed the footage and determined it was not relevant. RP 19. This was not their decision to make.

Wal-Mart's spoliation of evidence allows Wal-Mart to argue that the water of the floor was a temporary, transient condition when Ms. Tavai slipped. For the purpose of a summary judgment hearing, this evidence, when viewed in a light most favorable to the non-moving party, warrants an inference of spoliation.

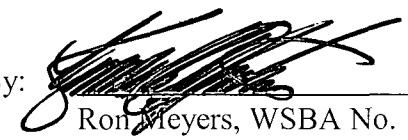
III. CONCLUSION

Owners are charged with knowledge of reasonably foreseeable risks that are deemed inherent in a self-service mode of operation. Ms. Tavai demonstrated that the water upon which she slipped was within a self-service area where customers handled and transferred goods, including grab-and-go drinks themselves, and were directly related to that specific self-serve operation. No additional proof of notice or forseeability is required. Additional issues of material fact remain including whether Respondent Wal-Mart was negligent in their choice of flooring and whether Appellant, Ms. Tavai, is entitled to the benefit of the spoliation presumption. Therefore, summary judgment was inappropriate.

The trial court's decisions granting Wal-Mart's Motion for Summary Judgment should be reversed and remanded to Superior Court for trial.

DATED: August 16, 2012

RON MEYERS & ASSOCIATES, PLLC

By: 

Ron Meyers, WSBA No. 13169
Ken Gorton, WSBA No. 37597
Tim Friedman, WSBA No. 37983
Attorneys for Appellants

No. 43099-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

AVRILIRENE TAVAI and THOMAS TAVAI,
and their marital community
Appellants,

v.

WAL-MART STORES, INC.,
a Delaware entity doing business in the State of Washington with its corporate headquarters in Bentonville, Arkansas
Respondent.

DECLARATION OF SERVICE

Ron Meyers
Ken Gorton
Tim Friedman
Attorneys for Respondents

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA # 13169
WSBA # 37597
WSBA # 37983

ORIGINAL

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS: 1. REPLY BRIEF OF APPELLANT; and
2. DECLARATION OF SERVICE.

ORIGINAL AND ONE COPY TO:

Clerk of the Court
Washington State Court of Appeals
Division II
950 Broadway Ste 300
Tacoma, WA 98402-4454

[✓] Via U.S. Postal Service
[ ] Via Facsimile:
[ ] Via Hand Delivery / courtesy of ABC Legal Messenger Service
[ ] Via Email:

COPY TO:

Attorneys for :
Donna Young, Esq.
Lee Smart
701 Pike Street
Seattle, Washington 98101
Attorney for Respondent

[✓] Via U.S. Postal Service
[ ] Via Facsimile:
[ ]Via Hand Delivery / courtesy of ABC Legal Messenger Service
[ ] Via Email:

DATED this 16 day of August 2012, at Lacey, Washington.

Alexis Grieco, Paralegal